IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 17 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

INTERCONTINENTAL (INDIA)

Versus

INDIAN SUGAR & GENERAL INDUSTRIES EXPORT IMPORT CORP.

Appearance:

MR SN SHELAT, SR. ADVOCATE, FOR NANAVATI & NANAVATI for Petitioner

MR GL SANGHI, SR. ADVOCATE WITH MR DHAVAL G NANAVATI, MR ROHIT TANDON AND MR B.H. CHHATRAPATI for SINGHI & CO. for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 09/02/2001

ORAL ORDER

1. The appellant preferred a Civil Suit in the City Civil Court, Ahmedabad, bearing Civil Suit No. 4889 of

2000 against the present respondents, seeking relief against invocation of a bank guarantee furnished on behalf of the plaintiff to defendant No.1 by defendant No.2. Along with the plaint, an application Ex.6 came to be seeking for interim injunction against invocation/encashment of the bank guarantee. The learned Judge presiding over Court No.10, City Civil Court, rejected the application while vecating the ad-interim protection granted in favour of the plaintiff. Aggrieved by the said order, the plaintiff has approached this Court with this appeal.

2. For the sake of convenience, the appellant is addressed to as "the plaintiff" and the respondents as "the defendants" in this judgment.

3. In order that the contentions raised by both the sides may be properly appreciated, certain facts need to be stated.

3.1 Defendant No.1 is a company which regulates sale and export of sugar. Tenders were invited for export of Indian White Crystal Sugar upon certain conditions. The plaintiff submitted an offer to defendant No.1 with certain conditions of standard form of contract. It transpires that there were negotiations between the parties on terms of the tender. Initially, the plaintiff furnished earnest money covering 2% of the tender price by demand draft and, thereafter, after following the procedure as required under the terms of the tender, furnished a bank guarantee worth Rs.1,66,63,500/-. Defendant No.1 was the beneficiary under the bank guarantee and defendant No.1-United Commercial Bank issued the bank guarantee. It appears that, thereafter, the plaintiff found some terms of agreement to have been changed by defendant No.1 and, ultimately, the plaintiff has sought relief against invocation/encashment of the said bank guarantee. The said bank guarantee is supposed to be valid upto the 25th February, 2001.

4. The contention that is raised by the plaintiff/appellant is that the bank guarantee is for performance of the contract and for performance of the contract, the pre-requirement is that there must exist a concluded contract. In the instant case, according to the plaintiff/appellant, the contract had not come into existence and, therefore, the question of invocation/encashment of bank guarantee does not arise.

5. Learned Senior Counsel, Mr. S.N. Shelat, appearing for the appellant, submitted that the Court

below has not appreciated that the bank guarantee is a performance guarantee for performance of a contract. If the facts of the case are properly appreciated, there is no contract between the parties. As per initial negotiations, the contract was supposed to be entered into a prescribed form and, admittedly, there does not exist a contract in the prescribed form. Mr. Shelat, therefore, submitted that there is absence of a concluded contract and, if there is no contract, there is no question of invocation/encashment of a bank guarantee issued to ensure performance of the contract.

5.1 Mr. Shelat submitted that the Court below failed to appreciate that, though the guarantee appears prima facie to be unconditional one, it would operate only on conclusion of the contract guaranteed under the bank guarantee. Mr. Shelat has drawn attention of this Court to clauses 10 and 14 of the communication inviting offer (Mark 3/1). In clause 10, there is a condition that successful tenderers may furnish a performance guarantee covering 2% of the value within five working days from the date of conclusion of deal in lieu of EMD. The performance guarantee shall be valid for 180 days from the date of issue and shall be returned on fulfilment of obligation by the buyer under the contract. In clause 14, it is provided that acceptance of offer shall be subject to the Rules and Regulations which the Government of India may impose from time to time regarding export of sugar from India and also subject to allotment of export quota by the Agricultural & Processed Food Products Development Authority. Mr. Shelat submitted that this itself indicates that the bank guarantee is required to be given only for performance of the contract that would come into existence later for which a formal contract in specified format is required to be executed. Admittedly, such contract is not executed.

5.2 It is contended that, defendant No.1 has made certain changes in the terms of the original tender and has tried to deprive the plaintiff of the advantage that the plaintiff may have got as an exporter. By virtue of the change, an attempt is made to convert the status of the plaintiff from buyer and then exporter to the status of a shipper. The benefit that the plaintiff would have got by virtue of the initial terms is sought to be pocketed by defendant No.1 to the detriment of the plaintiff by such changes made unilaterally by defendant No.1. It is undisputed that the contract was supposed to be entered into in the prescribed format. The format is on record which indicates that the seller, i.e. defendant No.1, agrees to sell and the buyer, i.e. the

plaintiff, agrees to buy Indian While Crystal Sugar on terms and conditions mentioned therein. Against this, attention is drawn of this Court to communication dated August 22, 2000, which is Sugar Sale Contract wherein it is stated that the plaintiff approached defendant No.1 to ship the said quantity and ISIEC has agreed to ship the cargo at the stipulated rate. Mr. Shelat, therefore, submitted that, an attempt is made to convert the status of the plaintiff to that of 'shipper'. This was not the original term.

5.3 Mr. Shelat has also drawn attention of this Court to the fact that defendant No.1 communicated this document dated August 22, 2000 by a letter dated the September 26, 2000, wherein the plaintiff was required to sign and return the document. In the earlier negotiations, the plaintiff had categorically stated that the plaintiff would be the exporter. This was indicated in communication dated August 22, 2000 from the plaintiff to defendant No.1 (Ex.3/2 in the Trial Court) and in the Annexure to that communication, at the bottom, it has been clearly stated that exporter to be Inter Continental (India) and ISGIES to be shipper. Defendant No.1 having committed the breach, the plaintiff has withdrawn its acceptance of the offer as is evident from the communication dated the 25th September, 2000 (Ex.3/12 in the Trial Court) and, therefore, now, there is no question of any performance of the contract. This aspect is overlooked by the Trial Court and the protection is refused against invocation/ encashment of bank guarantee. Mr. Shelat placed reliance on certain decisions. He urged that, ordinarily, protection against encashment of unconditional bank guarantee cannot be granted, but, here the bank guarantee is in respect of performance of a contract and, if such contract does no exist, there is no question of invocation/encashment of of bank guarantee and, therefore, protection against such encashment may be granted by allowing this appeal.

6. Defendant No.1 has come with a case that, although no formal deed of contract is created, the contract was concluded and was partially acted upon by the parties. Now the plaintff wants to withdraw therefrom and escape from the liability thereunder. This is only with that view that an attempt is made to seek protection against encashment of bank guarantee.

7. The appeal is opposed to by defendant No.1 represented by learned Senior Counsel, Mr. G.L. Sanghi. Mr. Sanghi submitted that, in fact, the Trial Court has properly appreciated the facts of the case in light of

the law. He submitted that, if the communications between the parties are seen, it is clear that the parties had concluded the contract and had acted thereupon. Therefore, there did exist a contract. It may be that a formal document of contract was not executed, but there was an agreement between the parties which was acted upon resulting into a concluded contract. The bank guarantee, therefore, would cover the contract. He submitted that the bank guarantee is unconditional one and it could not have been prevented from being encashed.

7.1 Mr. Sanghi submitted that, if injunction against encashment is given, it will have an effect on the transactions entered into by defendant No.1 with others. Defendant No.1 has already given a bank guarantee to another party following this transaction and the contract having not gone through, defendant No.1 would be required to make good the payment.

7.2 Mr. Sanghi submitted that bank guarantee is an independent contract that entered into between defendant No.1 and defendant No.2 and no protection could have been granted in favour of the plaintiff. Mr. Sanghi has drawn attention of this Court to the documents which indicate that following the agreement, both sides executed and signed those documents, meaning thereby that the parties had arrived at consensus ad idem and acted thereupon. He submitted, therefore, that the appeal may be dismissed.

7.3 Mr. Sanghi submitted that an attempt is lmade to play fraud on Court for obtaining desired order of injunction. A fabricated or forged document is sought to be pressed in service to indicate a condition in offer which never existed in the original offer tendered to defendant No.1. He, theefore, urged that no indulgence may be shown to such a party who does not approach the Court with clean hands.

8. Learned Senior Counsel, Mr. Shelat, in reply submitted that Mark 3/11 and 3/12 would indicate that there is no contract between the parties and, therefore, indulgence may be shown.

9. Having regard to rival side contentions, what is required to be examined is whether the injunction against invocation/encashment of bank guarantee is possible to be granted in facts of the present case.

10. So far as law relating to bank guarantee is concerned, there is no dispute about the fact that the

Courts have to be slow in granting injunction against invocation/encashment of bank guarantee. If the bank guarantee is unconditional, then Court may not interfere in the process of invocation/encashment of bank guarantee. It has to be examined whether the guarantee is conditional or unconditional in light of facts of each case. It cannot be said that no injunction can be granted against encashment of bank guarantee. If it is found that there is fraud played or that irritrieveable injury would be caused, the Court may grant protection against invocation/encashment of bank guarantee. Above principles have to be kept in mind while granting or rejecting a relief against invocation of bank guarantee and each case has to be examined individually and independently on its own merits.

11. Now, coming to the instant case, bank guarantee is produced on record, which clearly states that the bank irrevocably and unconditionally undertakes to pay to ISIEC the guaranteed amount should the plaintiff fail, for whatever reasons, to carry out wholly or in part, any of the obligations under the said offer and the subsequent contract to be concluded. It also states that the bank shall make the payment immediately upon ISIEC (defendant No.1) giving a notice of default on part of the buyer (i.e. the plaintiff) notwithstanding any dispute between the buyer and ISIEC (i.e.,defendant No.1). The bank has further agreed that ISIEC's notice shall be conclusive proof of the buyer's default. There is also a covenant to the effect that the guarantee shall not be affected (1) by any change in the constitution of the buyer, ISIEC or the bank or (2) by grant of any time by ISIEC to the buyer and or any forbearance/indulgence of any kind known by ISIEC to the buyer and/or (3) by any change in the terms and conditions of the contract.

12. A plain reading of the bank guarantee makes it clear that the bank has accepted absolute liability in the bank guarantee to secure due and faithful performance by the buyer of its obligation under the said contract pursuant to the said offer and that the decision of defendant No.1 on question of any default on part of the plaintiff would be conclusive. The bank guarantee states that the bank irrevocably and unconditionally undertakes to pay to ISIEC the guaranteed amount should the plaintiff fail, for whatever reasons, to carry out wholly or in part, any of the obligations under the said offer and the subsequent contract to be concluded.

12.1 In light of the above reading of the document, it is clear that the bank guarantee is irrevocable and

unconditional. It guarantees performance of the obligation under the said offer and the subsequent contract to be concluded.

13. Now, it is required to be examined whether the contentions raised by the plaintiff could have been or can be accepted. In this regard, certain communications between the parties need to be examined. Mark 3/2 is a communication from the plaintiff to defendant No.1 whereby certain offer was made. The said offer contained certain amendments to the ISIEC's standard contract, which were indicated in Annexure-I to the said communication. It is stated therein that the plaintiff is open to negotiations. Following that communication, defendant No.1 wrote back at Mark 3/3, a communication dated August 22, 2000, wherein they have clearly stated that they are not agreeable to certain proposals contained in the abovereferred communication from plaintiff. To this communication, the plaintiff replied on August 24, 2000 (Mark 3/4) wherein it is stated that the plaintiff thereby confirms the bargain at the terms mentioned in communication dated August 22, 2000, i.e. Mark 3/3. The result is that there was offer from the plaintiff with certain modifications. That offer was not wholly accepted and certain changes were suggested by defendant No.1. Plaintiff agreed to those changes and, as such, a deal was struck. The parties arrived at a consensus ad idem, which would mean formation of a concluded contract. Of course, formal document of contract was not executed at that point of time.

13.1 This conclusion that the parties arrived at a consensus ad id idem and thereby to a concluded contract is supported by the fact that the plaintiff provided the bank guarantee dated the 29th August, 2000 and, thereafter, took action in furtherance of the contract as is evident from certain documents jointly executed by the plaintiff and defendant No.1.

13.1.1 An application for grant of RCAC was sent to the Agricultural and Processed Food Products Export Development Authority, New Delhi, by defendant No.1 by communication dated the 9th September, 2000. In that application, it was clearly indicated that export was to be made by defendant No.1 along with the plaintiff. The I.E. Code was that of the plaintiff. It was also stated in column 9 thereof that the application is based on contract dated the 22nd August, 2000 between defendant No.1 and the plaintiff and backed by contract dated the 22nd August, 2000 between Inter Continental and GA International of Dubai. Likewise, a declaration was made

by the plaintiff along with defendant No.1 on the 12th September, 2000, pursuant to the contract.

14. All the above developments would indicate that there was consensus ad idem between the parties but a formal contract remained to be executed. But the parties did act upon the contract on the terms and conditions agreed at by correspondence and following that, the bank guarantee was furnished. Now, therefore, in light of the bank guarantee being unconditional one and prima facie the contract having been struck, the injunction sought by the plaintiff cannot be granted and could not have been granted by the Trial Court as well.

15. It would be relevant to note that once it is found that there is a concluded contract between the parties, by virtue of the covenant in the bank guarantee that the bank guarantee shall not be affected by any change in terms and conditions of the contract, even if the say of the plaintiff is accepted that defendant No.1 has made changes in the terms and conditions of the contract, the bank guarantee shall remain unaffected and no injunction against invocation of such bank guarantee can be granted.

16. Apart from above stated circumstances on question whether there was a concluded contract or not, it requires to be noted that even in paragraph 16 and 18 of the plaint, there is reference to breach of contract, which would pre-suppose existence of a contract.

17. This Court refrains from making any observation on aspect of fraud alleged by defendant No.1 against the plaintiff since the suit is pending and any observation made herein may affect finding on issue by Trial Court.

18. Mr. Shelat places reliance on decision in the case of Hindustan Construction Company Limited v. State of Bihar and Ors., as reported in (1999) 8 SCC 436, wherein the Apex Court observed that, if bank guarantee in unequivocal and unconditional terms undertakes to pay the amount without any demur or objection and irrespective of any dispute, the Court would refrain from showing indulgence. The Court also observed that if the bank guarantee is conditional, the beneficiary cannot have unfettered right to invoke the guarantee and Court can issue injunction against invocation of the guarantee in view of the facts of the case. He, therefore, urged that each case will have to be judged in facts of each of the case. There cannot be any dispute regarding this proposition and principle. However, as discussed above,

the bank guarantee is unconditional. There is, in fact, no dispute on that count. As discussed above, there is a concluded contract. There is no allegation of any fraud or irretrievable injury and, therefore, the decision will not help the plaintiff.

18.1 In the case of Larsen & Toubro Limited v. Maharashtra State Electricity Board and Others, (1995) 6 SCC 68, on which learned Senior Counsel Mr. Shelat relied upon, the Apex Court observed that injunction against enforcement of bank guarantee can be granted by a Court only in the event of fraud or irretrievable injustice. In facts of the case, the Court observed that since the dispute is pending before the Arbitrator, the Court below was justified in declining to grant injunction against invocation of the bank guarantee as the bank guarantee was security against the advance payment which was sought to be invoked by the respondent in time by making a request by a letter to extend validity of the guarantee for a further period of six months and if that was not done to treat the communication as notice for encashment. The Court observed that in case of conditional guarantee for partial release of retention money, which was to ensure only for successful completion of the trial operations and taking over of the plant and that even having ensued, the guarantee was not encashable on its terms and in order to prevent irretrievable injustice, injunction must be issued. The principles laid down in this decision will not help the plaintiff-appellant for the reason that fraud or irretrievable injustice is not even pleaded by the plaintiff before this Court. The only contention raised by the plaintiff before this Court is want of concluded contract.

18.2 Mr. Shelat, learned Senior Counsel relied on paragraph 262 of the Halsbury's Laws of England, Fourth Edition, Volume 9. The relevant portion runs as under :-

> "262. Contracts by correspondence. If a contract depends on a series of letters or other documents, and it appears from them that the drawing up of a formal instrument is contemplated, it is a question of construction whether the letters or other documents constitute a binding agreement or whether is no binding agreement until the instrument has been drawn up. The whole of the correspondence or documents must be considered; and a document which, taken alone, appears to be an absolute acceptance of a previous offer does not make the contract binding

if, in fact, it does not extend to all the terms under negotiation, including matters appearing from oral communication. Moreover two letters which at first sight appear to be an offer and an acceptance will not constitute a contract if it appears from subsequent negotiations that important terms forming part of the contract were omitted from those letters; and the mere fact that the parties think there is a binding contract is not conclusive. But once there has been a definite acceptance of all the terms of an offer and the acceptance was without qualification, further negotiations between the parties cannot, without the consent of both, get rid of the contract which has been made."

18.3 If facts of the present case are considered in light of the above paragraph of the Halsbury's Laws of England, it is apparent from the discussion in foregoing paragraphs and narration of facts that the parties arrived at a consensus ad idem. By communication an offer was made with certain changes in conditions by plaintiff. Some of the changes suggested were not accepted by defendant No.1 and some were accepted. The plaintiff agreed to and accepted the acceptance as well as non-acceptance indicated by defendant No.1 and, therefore, at that point of time, there was a contract concluded. The matter does not end here. The parties acted upon the contract and signed certain documents jointly in furtherance thereof and, therefore, although initially it is found that execution of a formal document is contemplated, the intention of the parties was to proceed with the contract even in absence of a formal document. Differently put, the plaintiff accepted the terms proposed by defendant No.1, without qualifications and acted upon it. In such a situation, the latter portion of paragraph 262 of Halsbury's Laws of England would become relevant, which runs as under :

"But once there has been a definite acceptance of all the terms of an offer and the acceptance was without qualifications, further negotiations between the parties cannot, without the consent of both, get rid of the contract which has been made."

Thus, a later communication by the plaintiff on the 25th September, 2000 (Mark 3/12) whereby it is alleged that defendant No.1 has altered the terms of proposed sale and has committed breaches and, therefore, the plaintiff does not agree to accept the modifications suggested by

defendant No.1 cannot be considered to have any impact on at least the contract of bank guarantee prima facie. The contract was concluded qua the plaintiff on August 24, 2000 when plaintiff wrote Mark 3/4 accepting the terms of Mark 3/3 of defendant No.1. Any change in condition, thereafter, will not affect the bank guarantee as per covenant in bank guarantee.

19. Mr. Sanghi also places reliance on certain decisions. He pressed into service decision in the case of Federal Bank Limited v. V.M. Jog Engineering Ltd. & Ors., 2000(3) Raj 319(SC), wherein the Apex Court held that in case of irrevocable bank guarantee, the buyer cannot obtain injunction against the banker on the ground that there was a breach of contract by the seller. The bank is to honour the demand for encashment if the seller prima facie complies with the terms of the bank guarantee or Letter of Credit, namely, if seller produces the documents enumerated in the bank guarantee or Letter of Credit.

19.1 He has also relied on the decision in the case of S.P. Chengalvaraya Naidu (Dead) by LRS v. Jagannath (Dead) by LRS, (1994) 1 SCC. He invited attention to paragraph 5 of the said judgment wherein it was held that the Apex Court did not agree with the High Court that there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence. In that matter, the question before the High Court was whether, in the facts and circumstances of the case, the plaintiff obtained the preliminary decree by playing fraud on the the Court, wherein the above observations were made by the High Court. The Apex Court observed that the principle of "finality of litigation" cannot be pressed to such an extent that it becomes an engine of fraud in the hands of dishonest litigants. Mr. Sanghi submitted that, in the instance case, the plaintiff has tried to play a fraud on Court by relying upon and pressing in service a document which contains interpolations which are not to be found in the original document. He, therefore, urged that for this reason also, the plaintiff could not have been granted and cannot be granted any indulgence in the form of injunction against invocation of bank guarantee.

19.2 Mr. Sanghi then relied on the decision in the case of U.P. State Sugar Corporation v. Sumac International Limited (1997) 1 SCC 568. He relied on paragraphs 12, 14 and 17 of the said judgment. In the said judgment, the Apex Court observed that in case of irrevocable and unconditional bank guarantee payable on

demand without demur, the bank is bound to honour the guarantee when it is sought to be encashed by the beneficiary irrespective of any dispute raised by the customers, i.e. the person at whose instance the bank guarantee was issued. The Apex Court, however, indicated two exceptions, namely, a fraud committed in the notice of the bank which would vitiate the very foundation of the guarantee or encashment of the bank guarantee would result irretrievable harm or injustice of the kind which make it impossible for the guarantors to reimburse himself. While considering what is irretrievable injury, the Apex Court observed that irretrievable injury must be of the kind which was the subject matter of decision in Itech Corporation case (566 Fed. Supp. 1210). The Apex Court observed that to avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds will have to be decisively established and a mere apprehension that the other party will not be able to pay is not enough.

20. In view of the above discussion, the situation that emerges is that, undisputedly, there was correspondence between the parties discussing conditions of the contract. A proposal was made by plaintiff indicating certain changes in standard memo of contract, to which there was partial acceptance and partial non-acceptance to the proposed changes. This communication by defendant No.1 to the plaintiff clearly indicated the details of accepted and not accepted changes. Plaintiff accepted and agreed to those terms and conditions of the contract. As such a contract came to be concluded. Following that, action was taken by both the parties, namely defendant No.1 and the plaintiff. Subsequently, a dispute arose and the plaintiff came out with the case that it is not agreeable to the contract.

20.1 The plaintiff then comes with a case that there is no concluded contract and the bank guarantee, therefore, cannot be encashed by defendant No.1 and defendant No.1 may, therefore, be injuncted from encashing the same. On perusal, it is found that the bank guarantee is unconditional and irrevocable. There is a covenant in the bank guarantee that change in terms and conditions of the contract will not affect the bank guarantee. Under the circumstances, even if some changes are made, as alleged, it would not affect the bank guarantee once parties arrived at consensus ad idem and acted upon it.

20.2 It requires to be noted that even the bank guarantee contains a covenant to the effect that the bank accepts to pay under the bank guarantee the amount should the buyer (plaintiff) fail for whatever reasons to carry out wholly or in part any of the obligations under the said offer and subsequent contract to be concluded and, therefore, in light of this clause, even a concluded contract cannot be insisted upon for escaping from the liability under the bank guarantee. The appeal, therefore, must fail and is dismissed. No costs.

21. At this juncture, learned Senior Counsel, Mr. Shelat states that the protection which was granted earlier may be continued for another period of in order to enable the plaintiff to approach the Apex Court. On the other hand, it is contended by Mr. Chhatrapati, learned advocate appearing for respondent No.1, that the protection which was granted earlier has already expired. But in view of the fact that the matter was being taken up for hearing, the bank guarantee was not sought to be encashed by defendant No.1 pendente lite. Thus, fact remains that the bank guarantee is not encashed. In order that no further complications may arise, defendant No.1 is restrained from receiving the bank guarantee amount from defendant No.2 till 25th February, 2001. It is clarified that it would be open for defendant No.1 to invoke the bank guarantee.

[A.L. DAVE, J.]
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